

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 14 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

ANTHONY P. VANDERSOMMEN,

Petitioner.

2 CA-CR 2008-0099-PR  
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication  
Rule 111, Rules of  
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200500218

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Edward G. Rheinheimer, Cochise County Attorney  
By David R. Pardee

Bisbee  
Attorneys for Respondent

Joy Bertrand

Scottsdale  
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Following a jury trial, petitioner Anthony Vandersommen was convicted of possession of marijuana and possession of drug paraphernalia, class six felonies; possession of methamphetamine for sale, a class two felony; and two counts of aggravated assault on a police officer, one with a deadly weapon or dangerous instrument, a class two felony, and

one without, a class six felony. The trial court sentenced Vandersommen to concurrent, presumptive prison terms, the longest of which is 10.5 years. He now seeks review of the trial court's summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., in which he claimed trial counsel had been ineffective. He argues that, at the very least, he is entitled to an evidentiary hearing. We will not disturb a trial court's denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 To state a colorable claim of ineffective assistance, a defendant must establish both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). There is a presumption that counsel acted properly and that counsel's decisions "'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955); *see also State v. Schurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). To show he was entitled to an evidentiary hearing, Vandersommen was required to establish a colorable claim for relief, that is, a claim which, if true, might have changed the outcome below. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *Watton*, 164 Ariz. at 328, 793 P.2d at 85.

¶3 Vandersommen argues, as he did below, that trial counsel was ineffective for failing to file a motion to suppress evidence found as the result of an illegal search and for failing to interview and present at trial two witnesses who would have provided exculpatory evidence. The trial court found Vandersommen had not presented any material issue of fact or law entitling him to relief.

¶4 According to the evidence presented at trial, Sierra Vista police officers Mitchell and Lamay responded to reports just before midnight that several gunshots had been fired near an apartment complex. The officers parked their police vehicles near the complex and began searching on foot for possible suspects. Approaching a large van parked in front of one of the apartments, they saw a male subject later identified as Vandersommen “c[r]ouched down behind the van in between the apartment and the van.” Mitchell identified himself as a police officer and asked Vandersommen to come out, explaining that he was investigating reports of shots fired in the area and asking if Vandersommen had heard anything. Observing that Vandersommen, who was smoking a cigarette, appeared extremely nervous and agitated, and that he kept “reaching up with his left hand smoking,” Mitchell repeatedly asked him to extinguish the cigarette. Vandersommen instead raised the hand with the cigarette as he approached the officers and simultaneously “made a motion down to his waist band area” with his other hand. Mitchell testified that, in light of the reported shootings; Vandersommen’s refusal to extinguish the cigarette, which Mitchell considered to be “just as dangerous as any other weapon”; and his having reached for his waistband area, a common location for weapons, Mitchell “grabbed [Vandersommen’s] right arm to prevent him from going into his pockets” and advised him he was going to conduct a pat-down search for weapons. As he patted Vandersommen’s right front pants pocket, Vandersommen objected verbally and began to resist. During the ensuing struggle, which lasted approximately two minutes, Vandersommen repeatedly kicked the officers, failed to respond to Mitchell’s “wrist lock” or “pain compliance” hold, attempted to remove a butterfly knife from his right rear pants pocket, and yelled to someone inside an apartment for help. A glass pipe fell out of Vandersommen’s pocket during the struggle. The encounter ended when

additional officers arrived to lend assistance. During the subsequent search incident to arrest, officers discovered methamphetamine and marijuana in Vandersommen's possession.

¶5 At trial, Vandersommen testified that, although Mitchell had explained that he was investigating reports of gunshots in the area, Mitchell had immediately conducted a pat-down search and begun to beat him after discovering he was carrying butterfly and Leatherman knives. He also testified that, although he had called for help during the struggle, the two-minute incident had essentially ended when a "couple of women" (the allegedly exculpatory witnesses) from the apartment complex and other officers arrived. In addition, Vandersommen testified that he had smoked methamphetamine earlier that day and that he was not contesting the charges related to the drugs found in his possession.

¶6 As he did below, Vandersommen argues that trial counsel was ineffective in failing to file a motion to suppress, which he claims would have changed the outcome of the case. Despite the trial court's failure to explain its reasons for rejecting this argument, which would have been helpful on review, the court did not abuse its discretion by concluding counsel had not been ineffective for having failed to file such a motion because Vandersommen failed to demonstrate that a motion to suppress would have been granted.

¶7 Relying on *Terry v. Ohio*, 392 U.S. 1 (1968), Vandersommen argues that, because the officers had no reasonable suspicion to stop or detain him, the related search and seizure violated the Fourth Amendment of the United States Constitution. He also relies on *In re Ilono H.*, 210 Ariz. 473, 113 P.3d 696 (App. 2005), in which this court found that a juvenile merely wearing clothing associated with gang activity in a high-crime area frequented by gang members did not provide reasonable suspicion to justify an investigatory stop or the search that followed. *Id.* ¶¶ 5-7. As we stated in *Ilono*, *Terry* and its progeny

permit an investigatory stop only if the officer has “a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’” *United States v. Sokolow*, 490 U.S. 1, 7 (1989), *quoting Terry*, 392 U.S. at 30, or if there is reasonable suspicion that the person stopped has committed a crime. *Ilono*, 210 Ariz. 473, ¶ 4, 113 P.3d at 697. Unlike the officers in *Ilono*, who had no articulable basis for detaining the juvenile, the officers here found Vandersommen hiding behind a parked car in the dark within minutes of receiving reports of several shots having been fired in the area.<sup>1</sup>

¶8 This case is, instead, more like *State v. Watkins*, 207 Ariz. 562, 88 P.3d 1174 (App. 2004), in which Division One reasoned that officers were justified in stopping an individual suspected of being a material witness to a felony offense. *Id.* ¶¶ 13-14. In *Watkins*, the court relied on the balancing test set forth in *Brown v. Texas*, 443 U.S. 47 (1979), in which the Supreme Court held that “[c]onsideration of the constitutionality of [seizures less intrusive than arrest] involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *Watkins*, 207 Ariz. 562, ¶ 13, 88 P.3d at 1177, *quoting Brown*, 443 U.S. at 50-51 (second alteration in *Watkins*).

¶9 As the state argued in its response to the petition for review, the facts in this case support the officers’ having stopped Vandersommen, at the very least, as a potential witness to the shooting incident, if not as an actual suspect. *See Watkins*, 207 Ariz. 562, ¶¶ 14-17, 88 P.3d at 1177-78. We briefly review the application of the balancing test set

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<sup>1</sup>Vandersommen seems to argue that an alleged disparity in the record about whether officers had encountered him approximately twenty, rather than sixty-one, minutes after the shots were fired is relevant to his claim that he was unlawfully detained. We find this to be a distinction without a difference based on the totality of the circumstances.

forth in *Brown*, and adopted in *Watkins*, to the facts in this record. The first factor in *Brown*, the presence of a valid public concern, was clearly satisfied based on reports that multiple shots had recently been fired in the area near the apartment complex. *See id.* ¶ 14. Next, by stopping and questioning Vandersommen, officers furthered the goal of apprehending the individual responsible for the shootings, the second factor in *Brown*. *See id.* ¶ 15. Finally, detaining Vandersommen to question him about the reported shootings was minimally intrusive, satisfying the third *Brown* factor. *See id.* ¶ 17.

¶10 Assuming the trial court found the stop to be lawful, a conclusion supported by the record, we can infer the court also found the pat-down search lawful. Based on the totality of the circumstances, including Vandersommen’s nervous demeanor, his refusal to extinguish his cigarette, and his gesture of reaching toward his waistband, the court could properly find the pat-down search lawful based on the officers’ reasonable fear for their safety or the safety of others. *See Terry*, 392 U.S. at 24.

¶11 Vandersommen next contends trial counsel should have used court-authorized funds to hire a private investigator to locate the two women listed as witnesses on the police report, claiming their testimony would have changed the outcome at trial. After locating the women, Rule 32 counsel submitted an affidavit. According to counsel, one woman had recalled in a telephone conversation that she had come outside on the night of the incident because she had heard Vandersommen “screaming in pain” and that “she did not understand how [Vandersommen] could have been charged with assaulting an officer, because [he] was on the ground the whole time she saw him.” Vandersommen did not submit an affidavit by the witness herself. He did, however, submit an affidavit from the other witness, stating:

[W]hen we saw lights from the cops flashing outside[,] [m]y sister and I immediately stepped outside and saw three or four cops kicking and hitting a young man[.] He wasn't doing anything but shielding himself and yelling for them to stop. I then went back inside the apartment because I didn't know what to do or how to stop it.

Vandersommen contends these witnesses would have supported his testimony that he did not attempt to use a knife against the officers or exhibit any “physical resistance or aggressive behavior” toward them and claims trial counsel was ineffective for having failed to interview the women before trial and call them as witnesses. He contends that, if trial counsel had done so, Vandersommen would have been acquitted of the aggravated assault charges or at least convicted of lesser included offenses as to both of the officers instead of just one.

¶12 But, by Vandersommen's own admission at trial, the witnesses observed his interaction with the officers after the actual incident had ended. The trial court first reviewed the two affidavits, one from Rule 32 counsel and the other from one of the witnesses, before it rejected Vandersommen's claim. We can thus infer the court concluded Vandersommen had not been prejudiced by trial counsel's alleged failure to locate and interview the women before trial or by his failure to offer their testimony at trial, presumably because Vandersommen himself testified they were not present during the actual struggle that led to the assault charges against him and because their testimony would not have made a difference at trial. Moreover, Vandersommen did not submit an affidavit by trial counsel. Rather, he claimed in his reply to the state's opposition to his petition for post-conviction relief that he “need not submit an affidavit of prior counsel describing what, if anything he did to procure these witnesses” because “[t]he record . . . demonstrates that counsel did no pretrial investigation.” In the absence of an affidavit by trial counsel, Vandersommen's

claims regarding counsel’s conduct or his reasoning for proceeding as he did are speculative, at best. *See* Ariz. R. Crim. P. 32.5 (affidavits supporting allegations of petition for post-conviction relief shall be attached to it). For all of these reasons, we conclude the court did not abuse its discretion by dismissing this claim.

¶13 Vandersommen alternatively argues that the proffered testimony of the two witnesses constitutes newly discovered evidence pursuant to Rule 32.1(e)(2), which requires that a “defendant [have] exercised due diligence in securing the newly discovered material facts.” Having argued that the record shows trial counsel “conducted little, if any, pretrial investigation and did not use the resources the trial court authorized,” Vandersommen cannot simultaneously claim that counsel exercised due diligence to discover the asserted newly discovered information, as Rule 32.1(e)(2) requires.

¶14 Because Vandersommen failed to show the outcome of the case would have been different but for trial counsel’s allegedly deficient performance, we find no abuse of discretion in the trial court’s dismissal of his claims without an evidentiary hearing. Although we grant the petition for review, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge